

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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ZONEPERFECT NUTRITION COMPANY	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 04-10760-REK
	)	
	)	
HERSEY FOODS CORPORATION,	)	
HERSEY CHOCOLATE &	)	
CONFECTIONERY CORPORATION, and	)	
BARRY D. SEARS	)	
	)	
Defendant.	)	
	)	

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**DR. BARRY SEARS' MEMORANDUM OF LAW  
IN OPPOSITION TO PLAINTIFFS' MOTION  
FOR EXPEDITED CASE MANAGEMENT ORDER  
AND JULY, 2004 TRIAL DATE**

On Saturday, April 17, 2004, Dr. Barry Sears ("Dr. Sears") was served with a two hundred and thirty one (231) paragraph complaint in this matter containing fifteen (15) counts and twenty-eight (28) exhibits. Although the complaint alleges irreparable harm, the complaint is not accompanied by any motion for a preliminary injunction. Despite this fact, as well as the fact that the plaintiff has been aware of the allegations raised in their complaint for months, ZonePerfect Nutrition Company ("ZonePerfect II")<sup>1</sup> nonetheless seeks an expedited case management order and a trial on the merits on July 15, 2004, approximately two and a half months from today. The proposed scheduling order and trial schedule seeks to turn on its head the Federal Rules of Civil Procedure and

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<sup>1</sup> To avoid confusion, Dr. Sears will refer to the entity owned in part by Christopher Baker as "ZonePerfect I." Dr. Sears will identify the successor entity (and the plaintiff in this case) as "ZonePerfect II."

abandon this Court's Local Rules. The proposed scheduling order provides no timetable for the filing of summary judgment motions or Daubert motions, provides no real opportunity for Dr. Sears to move to dismiss any of the counts brought against him (let alone an opportunity for the Court to rule on any such motion), provides no reasonable opportunity for Dr. Sears to file counterclaims or join other parties and requires that experts be retained and reports disclosed in a little over a month's time, among several other unrealistic deadlines. Additionally, the proposed trial date of July 15, 2004 will fall a week before the Democratic National Convention in Boston, making the expected two to three week jury trial even more unrealistic.

Dr. Sears is willing to entertain the concept of an expedited discovery schedule, so long as the plaintiff appropriately files a motion for a preliminary injunction, and early discovery is limited to issues related to a preliminary injunction hearing to be held on or about July 15, 2004. Towards that end, Dr. Sears and co-defendant Hershey proposed such a schedule to plaintiff's counsel on Friday, April 23, 2004. That schedule is attached hereto as Exhibit A. This proposal will allow the Court to test the plaintiff's cries of irreparable harm on an expedited basis while at the same time allowing the parties to assert counterclaims, third party claims and conduct discovery on the majority of the claims asserted in this case in a reasonable and rational manner.

The schedule proposed by the plaintiff is unworkable for a number of reasons. Among other things, in order to prepare this case properly for a full trial on their fifteen (15) count Complaint, multiple depositions will have to be taken given plaintiff's apparent plan to plumb "the intent of the parties" (Complaint, ¶ 60) in the signing of the October , 2001 Stock Repurchase Agreement. This discovery may include the

depositions of attorneys who negotiated the Agreement between Dr. Sears and ZonePerfect I. Voluminous files will have to be produced, not only including the files of the attorneys who negotiated the Agreement, but also the files of those who conducted due diligence for Abbott Laboratories (“Abbott Labs”) prior to its purchase of ZonePerfect I. In addition, given the nature of the allegations made by the plaintiff, what ZonePerfect I’s owners told Abbott Labs about Dr. Sears, his separation from the company, Zone technology and the nutrition bar market generally may be of significance. Depositions and files pertaining to these discussions will also have to be thoroughly discovered prior to the jury trial on the merits. Out of state depositions may be necessary given the fact that two of the entities involved in this case, Abbott Labs and Hershey Foods Corporation, have no offices in Massachusetts. In addition, Dr. Sears intends to file a counterclaim based upon ZonePerfect’s misuse of Dr. Sears’ name creating the false impression that Dr. Sears is still in some way associated with and endorsing ZonePerfect’s products. Dr. Sears also expects to conduct discovery to ascertain whether third party claims are appropriate. Given the substantial and significant discovery required to prepare properly for a several week jury trial of a fifteen (15) count Complaint, as well as counterclaims yet to be filed, the expedited discovery and trial schedule proposed by the plaintiff should not be approved by this Court.

## **BACKGROUND FACTS**

ZonePerfect’s complaint would lead one to believe that upon his separation from ZonePerfect I in 2001, Dr. Sears signed an agreement giving up his right to use any ZONE marks on any food products at any time. This, ZonePerfect II alleges, was ZonePerfect I and Dr. Sears’ “intent” (Complaint, ¶ 60) and that “Sears understood and

expressly agreed that he was without right to use (or approve anyone else to use) ZONE marks in the sale or distribution of food products.” (Complaint, ¶ 63). Of course there is no contractual provision which provides for such a thing, and in fact, Dr. Sears’ agreement with ZonePerfect I unambiguously states the exact opposite in declaring, among other things, that ZonePerfect “shall have no rights in or to any inventions, product formulations, developments, innovations, techniques, designs, processes, procedures, improvements, work of authorship created or developed by [Dr. Sears after December 31, 1998] including any intellectual property rights therein or thereto.” See Exhibit B, ¶ 2(e) (Stock Repurchase Agreement). In addition, the agreement also unambiguously provides that “there shall be no restrictions, limitations or prohibitions on the activities of [Dr. Sears] or [ZonePerfect] upon consummation of the Closing.” Id., ¶ 8(a).

Years earlier, in the spring of 1998, Dr. Sears had a falling out with ZonePerfect I which evolved, at least in part, from Dr. Sears’ concerns about some of the newer products being brought to market. Dr. Sears’ employment was terminated effective December 31, 1999. See Exhibit B, ¶ 6(b). Despite the allegations in the Complaint that Dr. Sears left ZonePerfect I to pursue “scientific research and writing” (Complaint, ¶ 56), in fact, both parties knew that Dr. Sears intended to separate from ZonePerfect to eventually compete in the nutrition bar industry.

Thereafter, Dr. Sears and ZonePerfect I engaged in a series of long and protracted negotiations, all designed toward enabling Dr. Sears to sever all relationships with ZonePerfect so that he might pursue other opportunities. The October 17, 2001 Stock Repurchase Agreement was the consummation of several years of negotiations,

discussions and agreements, all of which occurred between multiple lawyers and multiple parties. During those negotiations, ZonePerfect I demanded that the agreement include non-competition and non-disparagement clauses binding Dr. Sears. Dr. Sears refused and the provisions were not included in the final agreement.

Despite the fact that Dr. Sears has not worked with ZonePerfect for over five (5) years, ZonePerfect continues to utilize Dr. Sears' name in attempting to confuse the public into believing that Dr. Sears approves of and endorses the ZonePerfect product line. Attached hereto as Exhibit C is a copy of certain pages of ZonePerfect's website which, in addition to offering Dr. Sears' books for sale, calls itself "the official website of the Zone diet," a diet created by and inextricably connected with Dr. Barry Sears.

## **ARGUMENT**

The plaintiff's proposed discovery schedule assumes that virtually no discovery will be required, in part, because, they apparently contend, this case relies upon a single contract executed by Dr. Sears in 2001. This case is about much more than a single document.

### **I. THE DISCOVERY WHICH WILL *ACTUALLY* BE REQUIRED PRIOR TO A TRIAL ON THE MERITS**

As set forth above, the Stock Repurchase Agreement between Dr. Sears and ZonePerfect I was negotiated over several years by multiple law firms as well as the parties themselves. Despite the plaintiff's suggestion to the contrary, the Stock Repurchase Agreement does not restrict Dr. Sears from utilizing the ZONE mark. As a result, ZonePerfect II apparently plans to argue that such a restrictive limitation was "the parties' intent" (Complaint, ¶ 60) and that the agreement is ambiguous. Discovery concerning plaintiff's contention in this regard will be substantial. This will include

depositions of the principals involved in the negotiations, as well as lawyers from Testa, Hurwitz & Thibeault, LLP, who represented Dr. Sears, and lawyers from the Philadelphia office of Dechert, Price & Rhodes, as well as a lawyer from Hale and Dorr, who represented ZonePerfect I. Each of these individuals will have to be deposed if "the parties' intent" is at the heart of plaintiff's allegations, as it appears to be.

In addition, before a trial on the merits, discovery will be necessary on the due diligence performed by Abbott Labs prior to its purchase of ZonePerfect I, as well as those communications, both written and oral, made by ZonePerfect I to Abbott Labs, both before, during and after the sale was consummated. This evidence is likely to reveal that either ZonePerfect I's owners misled Abbott Labs about important facts relating to Dr. Sears, his Stock Repurchase Agreement, the nutrition bar industry and Zone technology or that Abbott Labs failed to adequately perform its due diligence in connection with the purchase. Because Abbott Labs is a corporation located in Illinois, out of state depositions and document productions are likely to be necessary.

These are but a few examples of the voluminous and plainly relevant discovery needed to prepare this case properly for trial on this fifteen (15) count Complaint. ZonePerfect's proposed schedule would unfairly and improperly prejudice the defendants as it would be virtually impossible to conduct the above referenced discovery in less than two months' time.

## **II. THE CASES CITED BY THE PLAINTIFF DO NOT SUPPORT A REQUEST FOR AN EXPEDITED TRIAL DATE**

The cases cited by the plaintiff in support of their request for a trial on the merits in approximately eighty (80) days do not support their extraordinary request. In Re Websecure, Inc., 1997 U.S. Dist. LEXIS 19600 (D. Mass. 1997) (O'Toole, J.) for

example, granted expedited discovery only as to a narrow, limited issue which had direct bearing on whether injunctive relief was appropriate. No early trial date was set and the Court did not order all discovery to be completed within weeks. ZonePerfect contends that Lugo v. Alvarado, 819 F.2d 5, 7 (1<sup>st</sup> Cir. 1987) stands for the position that expedited proceedings are warranted if the plaintiff can demonstrate potential prejudice and irreparable harm. The cited case does not stand for this proposition. In fact, the case involved “extensive discovery” spanning seven (7) months and the appeal of a decision by the District Court not to stay discovery during the pendency of a motion for summary judgment. Id., at 6. The Court in Aaron v. Mattikow, 146 F. Supp 2d 263 (E.D.N.Y. 2001) ordered limited discovery on a discrete issue two years after the plaintiff had filed the complaint. Schonbek Worldwide Lighting, Inc. v. Am. Lighting Fixture Corp., 2002 U.S. Dist. LEXIS 4761, \*2 (D. Mass. 2002) ordered an “expedited trial” (without explanation) one year after the case had been commenced.

ZonePerfect also cites a series of cases which purport to discuss irreparable harm in the context of trademark infringement cases. These cases have no bearing on whether the Court should order an expedited discovery schedule and an early trial date because each of these cases specifically involved a plaintiff moving for a preliminary injunction and did not involve any sort of request for an expedited discovery and/or full trial schedule. See Societe Des Produits Nestle, S.A. v. Casa Helventia, Inc., 982 F.2d 633 (1<sup>st</sup> Cir. 1992) (discussing “irreparable harm” in trademark case in the context of a preliminary injunction); Sears, Roebuck & Co. v. Sears Financial Network, Inc., 567 F. Supp. 857 (D.D.C. 1983) (another case cited by ZonePerfect involving the request for a preliminary injunction); The Keds Corp. v. Renee International Trading Corp., 888 F.2d

215 (1<sup>st</sup> Cir. 1989) (same); Volkswagenwerk Aktiengesellschaft v. Wheller, 814 F.2d 812 (1<sup>st</sup> Cir. 1987) (same).

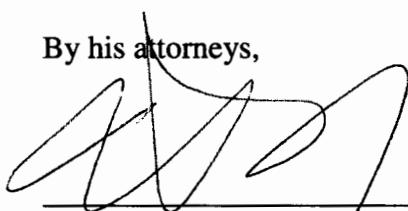
ZonePerfect fails to cite a case allowing for an expedited discovery schedule and trial date in circumstances such as those present here because to grant such a request would be virtually unprecedented. If ZonePerfect believes that it is likely to succeed on the merits of its claims and contends that the defendants' actions will cause irreparable harm, then ZonePerfect should file a motion for a preliminary injunction. Dr. Sears' proposed schedule provides ZonePerfect with just that opportunity. Quite simply, unsubstantiated cries of irreparable injury are not unique to this case. These allegations are made in virtually every trademark case. ZonePerfect's discovery and trial schedule effectively requests that the Court adopt a new Local Rule for intellectual property cases allowing for limited discovery and trial dates occurring within three (3) months of the filing of a complaint. There is simply no basis for the creation of a new local rule in this regard.

### **CONCLUSION**

For the forgoing reasons, Dr. Sears respectfully requests that the Court deny ZonePerfect's request for an expedited discovery and a trial date and enter the scheduling order attached hereto as Exhibit A.

BARRY D. SEARS,

By his attorneys,



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DATED: April 23, 2004